90-317

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO.

PHYLLIS PRUITT, Individually
and KATIE C. PRUITT, a Minor
by PHYLLIS PRUITT, her Mother
and "Next Friend",

Petitioner

vs.

P.P.G. INDUSTRIES, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals incorrectly applied the federal summmary judgment standard expounded in Celotex Corporation v. Catrett, 477 U.S. 317, granting summary judgment in this case depriving Petitioner of an appropriate jury determination and due process of law by:

(a) Improperly weighing the evidence;

(b) Failing to view all evidence in the light most favorable to Petitioner;

(c) Improperly concluding Respondent's warning sufficient as a matter of law.

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vs.

P.P.G. INDUSTRIES, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner Phyllis Pruitt, Individually and Katie C. Pruitt, a Minor by Phyllis Pruitt, her Mother and "Next Friend" respectfully prays that a writ of certiorari issue to review the

judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 1, 1990, rehearing denied May 1, 1990.

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OPINIONS BELOW

The opinion of the Court of Appeals dated March 1, 1990, is reported in 895 F2d. 734 and appears in the Appendix hereto. The opinion of the District Court for the Northern District of Georgia dated June 13, 1989 also appears in the Appendix hereto. The Order of the Court of Appeals dated May 1, 1990, denying petition for rehearing appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered March 1, 1990. A timely petition for rehearing was denied on May 1, 1990, and this Petition for Certiorari was filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rules of Civil Procedure, Rule 56(c) Summary Judgment:

> if... "there is no genuine issue as to any material fact... the moving party is entitled to a judgment as a matter of law..."

Constitution of the United States, Amendment Five:

> "No person... shall... be deprived of life, liberty, or property, without due process of law..."

Constitution of the United States, Amendment Seven:

> "...the right to trial by jury shall be preserved..."

Constitution of the United States,

Amendment Fourteen:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

This wrongful death, defective warning case, involves the grant of summary judgment against Petitioner by the United States Court for the Northern District of Georgia as affirmed by the Eleventh Circuit Court of Appeals. When viewing the evidence in the light most favorable to the Petitioner as required under Rule 56 of the Federal Rules of Civil Procedure, the evidence establishes Homer T. Pruitt died of chemical pneumonitis at the age of 26 as the result of aspirating the aerosolized form of 1-1-1 Tri-Chloroethane (Tri-Ethane), a

clear, colorless, inherently toxic chemical degreasing solvent manufactured by Respondent. In carrying out the normal duties of his employment with Lockheed Aircraft Corporation, the decedent and other employees administered the toxic cleaning agent by utilizing hand-held pump-spray or squeeze bottles that created an aerosolized mist. The decedent collapsed on the job after brief exposure to aerosolized Tri-Ethane after aspirating droplets produced from a pump-spray bottle.

A wrongful death action on behalf of the widow and child of the deceased was initially filed in the Superior Court of Cobb County, Georgia. The Respondent exercised its right to remove the case based on diversity of citizenship to the United States District Court for the Northern District of Georgia.

The inherently toxic product of Tri-Ethane produced by Respondent was shipped to decedent's employer (Lockheed) in 55-gallon drums. The decedent and other employees would transfer the cleaning product to pump-spray or squeeze bottles for use on the job.

A warning label appeared on the drums stating in large letters "Warning! Vapor harmful." In smaller letters the label stated:

> "DO NOT BREATHE VAPORS." High vapor concentrations can cause dizziness, unconsciousness or death. USE ONLY WITH ADEQUATE VENTILATION. Ventilation must be sufficient to limit employee exposure to Tri-Ethane below permissible limits...DO NOT SWALLOW. SWALLOWING MAY CAUSE INJURY OR DEATH."

Respondent also provided Lockheed a material safety data sheet stating:

> Tri-Ethane is primarily a central nervous system depressant. Inhalation can cause irritation

> of the respiratory system, dizziness, nausea, lightheadiness, unconsciousness, possible central nervous system damage and even death in confined or poorly ventilated areas. Fatalities following severe acute exposure to various chlorinated solvents have been attributed to ventricular fibrillation.

While the interpretation of the evidence is disputed, when viewed in the light most favorable to Petitioner, the evidence established exposure to the aerosolized form of Tri-Ethane was potentially more harmful than exposure to the vaporized form of Tri-Ethane. Evidence also established that agents of Respondent were in possession of information and documentation indicating the potential harmful effects of aerosolized Tri-Ethane. The material safety data sheets, provided by the Respondent to Lockheed, were modified shortly after decedent's death to include

information regarding the dangers of aerosolized Tri-Ethane.

The facts above cited can be inferred directly from the Order of the United States District Court for the Northern District of Georgia in this case as well as the decision of the United States Court of Appeals as contained within the appendix attached hereto.

Summary judgment was initially granted June 13, 1989,by the District Court and affirmed March 1, 1990, by the Eleventh Circuit Court of Appeals. A timely petition for rehearing was denied May 1, 1990.

REASONS FOR GRANTING THE WRIT

THE FEDERAL STANDARD FOR GRANTING SUMMARY JUDGMENT MUST BE CLARIFIED TO PREVENT LOWER COURTS FROM WEIGHING EVIDENCE IN AN ABUSIVE MANNER TO DEPRIVE LITIGANTS OF THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL AND DUE PROCESS OF LAW.

This case would not have been determined by summary judgment prior to this Honorable Court's decisions of Celotex Corporation v. Catrett, 477 U.S. 317 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) which attempted to clarify and promulgated the "Federal Standard" for summary judgment. These cases were specifically relied on by the District Court in granting Summary Judgment as well as later the Circuit Court of Appeals in affirming this action. Obviously, clarification of the summary judgment standard was needed to enhance

judicial economy in reducing and eliminating frivolous or meritless cases without denying deserving litigants of their inherent constitutional rights including their right to a jury trial.

Celotex, supra, and Anderson, supra, have created a summary judgment renaissance and have provided lower courts with a "lethal weapon" in trimming crowded court cases and calendars. See generally, "Overruling Tradition: Summary Judgment in the Eleventh Circuit after 1986", Mercer L. Rev., Vol. 41, pp 737-768.

The practical application of the new Federal Standard for Summary Judgment as promulgated in Celotex, supra, and Anderson, supra, have and will create legitimate concerns regarding the rights of specific and individual litigants. In attempting to enhance judicial economy

obvious dangers are apparent in the practical application of the summary judgment standard by lower courts. It is respectfully submitted that this case demonstrates an abuse of the application of the Federal Standard for Summary Judgment and has simply resulted in denying this litigant her constitutional right to a jury trial and due process of law.

The Petitioner respectfully directs this Honorable Court to the dangers inherent in the practical application of the Federal Standard for Summary Judgment as eloquently expressed in Justice Brennan's severe criticism of the majority in Anderson, supra, beginning at 266:

But the Court's opinion is also full of language which would surely be understood as an invitation - if not an instruction - to trial courts to assess and weigh evidence much as a juror would: "When determining if a genuine factual issue... exists..., a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability... for example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." Ante, at 254, 91 L.Ed. 2d, at 215 (Emphasis added).

"[T]he inquiry...[is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Ante, at 251-141, 91 L.Ed. 2d, at 214 (Emphasis added).

"[T]he judge must ask himself... whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Ibid.

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet the "quantum." I would have thought that a determination of the "caliber and quantity." i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount weighing the evidence. (Emphasis added).

In no circuit has confusion among the bench and bar been more apparent regarding the appropriate application of the Federal Standard as to summary judgment as in the Eleventh Circuit. Pursuant to Celotex, supra, and Anderson, supra, the movant carries his burden by showing the Court that there is "an absence of evidence to support the non-moving party's case." Celotex, supra, 325. The non-movant, however, bears the burden of making a sufficient showing establishing the existence of

each element essential to his case, and on which he will bear the burden of proof at trial. The Court, resolving all reasonable doubts in favor of the non-movant, must determine "whether a fair minded jury could return a verdict for the plaintiff on the evidence presented." Anderson, supra, at 252.

However, beyond these general statements of law, the Eleventh Circuit continues to send mixed signals as to the appropriate application of summary judgment. In Tippens v. Celotex Corporation, 805 F2d 949 (Eleventh Circuit 1986) the Court of Appeals reversed the District Court's grant of summary judgment. After citing Celotex Corporation v. Catrett, supra, the judge in Tippens, supra, stated as follows:

> If one or more of the essential elements is in doubt, then summary judgment must not be granted.

> Summary judgment is such a lethal weapon, depriving a litigant of a trial on the issue, caution must be used to ensure only those cases devoid of any need for factual determinations are disposed of by summary judgment. Tippens, supra, 952-53.

Again, in George v. Brandychase Ltd. Partnership, 841 F2d, 1094, (Eleventh Circuit, 1988) the Court of Appeals reversed a district court grant of summary judgment in a failure to warn case. In this case the Court noted that questions of negligence and proximate cause are peculiarly within the province of the jury and existence of material fact prevents summary adjudication. See George, supra, 1097.

Apparent difficulties present themselves in attempting to reconcile the above Eleventh Circuit cases with the present case. It is respectfully submitted that the present case provides this Honorable Court with an opportunity

to further clarify the Federal Standard in an attempt to give guidance and consistency to the lower courts and also to establish parameters and limits for the application of the appropriate Federal Standard by lower courts preoccupied with judicial economy.

THE FEDERAL STANDARD FOR SUMMARY JUDGMENT HAS BEEN SPECIFICALLY MISAPPLIED IN THIS CASE.

In the final analysis the Eleventh Circuit Court of Appeals found Respondent's warning was adequate as a matter of law. With all due respect to the lower courts, Petitioner submits that it is not possible to have reached this conclusion without having weighed the evidence, and, further impossible for the lower courts to have determined the sufficiency or insufficiency of the Petitioner's evidentiary showing without

again having weighed the evidence, all in contravention of summary judgment standard of review requirements.

Petitioner strongly urges she did, in fact, sustain her burden of making a factual showing which would have precluded the grant of summary judgment and such showing was made even when measured against the "Federal" Standard as articulated in Celotex Corporation v. Catrett, supra, and Anderson v. Liberty Lobby, Inc., supra, which continue to require lower courts to resolve all reasonable doubts and inferences in Petitioner's favor in making a determination as to whether a fair minded jury could return a verdict for Petitioner on the state of the record.

A primary question to be considered by this Honorable Court is whether in the

name of judicial economy lower Federal Courts are now denying litigants their basic rights to a jury trial and due process of law in violation of the Fifth, Seventh, and Fourteenth Amendments to the Constitution of the United States.

The specific warning in this case directed itself to the dangers of inhaling or ingesting the toxic substance in gaseous or liquid form. The warning directed appropriate ventilation to reduce exposure. However, the death in this case resulted directly and proximately from the aspiration of the aerosolized form of the toxic substance. Exposure to the aerosolized version of this toxic substance is potentially more harmful than the other types of exposure which were contained within the warning. The Respondent also had knowledge of this potential for increased harm due to

exposure to the aerosolized form of the product. There was absolutely no warning as to the danger of exposure to the aerosolized form of the toxic substance or procedures to prevent this exposure. This is in the context that the decedent died while utilizing the product from squeeze spray bottles which created an aerosolized mist in accomplishing the normal duties of his employment.

At Page 735 of the opinion, the Court of Appeals concluded,

> "A reasonable viewer of P.P.G.'s label would have to conclude from the warning that "breathing" or "inhaling" the solvent in liquid form was at least as dangerous as inhalation of its vapors, and that appropriate precautions should be taken in any event, namely, adequate ventilation and avoidance of direct contact with the substance in either form."

It is respectfully submitted that this conclusion, in light of the evidence, amounts to an improper

inference in violation of the standards to be employed for summary judgment applying Rule 56 of the Federal Rules of Civil Procedure, even in light of Celotex Corporation v. Catrett, supra. As previously indicated, Celotex, supra, interprets Rule 56 (c) as a mandate to enter summary judgment against a party who fails to make a showing essential to that party's case. For Celotex to apply, there can be "no genuine issue as to any material fact." See Celotex, supra, at Page 322.

However, Celotex does not negate the concept that the Court must view all evidence and inferences to be draw pursuant thereto in a light most favorable to the non-moving party. See Libernois v. Medical Disposals, 837 F2d, 1018, 1022 (Eleventh Circuit, 1988). All reasonable doubts must be resolved in the

non-moving party's favor. Libernois, supra, at Page 1022.

If, under the circumstances of this case, the Respondent's warning is deemed adequate as found by the Court of Appeals, this would essentially indicate that despite a particular product's non-obvious dangerous characteristics, any warning which advises "harm or death may occur due to exposure" is all that is necessary to absolve the manufacturer. This is not and should not be the law.

The lower courts have failed to appreciate the complexities of the warning issue in this case. In evaluating the adequacy or inadequacy of a particular warning, the real underlying issue is failure to communicate a need for protective or avoidance behavior, so it is really a communication deficiency that is being alleged. Most warning

issues are sufficiently complex so as to require expert testimony and jury resolution. Every warning should be evaluated to assure that it does not create a new danger, increase the likelihood of another unsafe practice or promote an improper utilization of the product. See generally...."Management Considerations In Formulating Warning And Safety Information Programs For Liability Prevention," George A. Peters, Product Liability Law Journal, Volume 1, No. 4, January, 1990, pp. 307, 310 and 316.

In this case the implication arises of the creation of a foreseeable new danger by not addressing the danger of aspiration. There is no evidence the decedent failed to comply with the specific warning recommendations as to exposure, ventilation or otherwise. The warning issues in this case are

sufficiently complex to require jury determination. The granting of summary judgment in this case disposed of a complex issue of warning adequacy in a totally inadequate and perfunctory manner.

The lower courts had held the warning in this case adequate as a matter of law in the face of evidence the decedent died as a result of a specific, different and increased foreseeable danger unaddressed in Respondent's warning.

Petitioner's case can be summarized as follows:

(1) Homer T. Pruitt's death was directly and proximately caused by the aspiration of an aerosolized form of Tri-Ethane, an inherently toxic product produced by Respondent;

(2) Aspiration of Tri-Ethane is

potentially more lethal than inhalation;

(3) The deceased was exposed to the aerosolized form of Tri-Ethane in carrying out the normal duties of his employment;

(4) Respondent knew, or should have known, in the exercise of reasonable and ordinary care of the increased, potential harm of aerosolized Tri-Ethane; and

(5) Respondent failed to provide adequate warning of the potential danger of aspiration of aerosolized Tri-Ethane.

There was evidence supporting each of the above points contained within the record which could be reviewed by this Honorable Court upon grant of this Writ.

It is respectfully submitted that each of the above points was sufficiently established by Petitioner and that a genuine issue exists as to each

including, but not limited to, the adequacy of Respondent's warning label. The Manager of Industrial Hygiene, Health and Toxicology for Respondent's Chemical Division acknowledged the existence of relevant scientific studies indicating increased danger of physical harm from the aerosolized form of Tri-Ethane. Despite this knowledge no modifications were made to the warning label to indicate the potential increased risk or the potential harm to humans if such an exposure were to occur. The realization of this specific knowledge when interpreted in the light most favorable to Petitioner certainly is sufficient to carry Petitioner's burden in a summary judgment proceeding. To conclude otherwise amounts to a weighing of the evidence and drawing inferences unfavorable to Petitioner which on its

face should exceed any mandate of a new federal standard which may have been promulgated by Celotex, supra.

The adequacies of the warnings and instructions on the label in light of the foreseeable danger is a jury question (emphasis added). Copeland v. Ashland Oil, Inc., 188 Ga. App. 537, 538; Beam v. Omark Industries, 143 Ga. App. 112. THE FORESEEABLE DANGER IN THIS CASE WAS NOT MERE EXPOSURE TO THE CHEMICAL OR VAPORS OF THE CHEMICAL BUT EXPOSURE TO AEROSOLIZED DROPLETS OF THE CHEMICAL.

The harm caused by such exposure, i.e., chemical pneumonitis, was not the same harm that would have resulted if the exposure was only to the vapors of the chemical. The warning in this case directs itself to inhalation of the toxic material in a gaseous form, or ingestion, i.e. swallowing the toxic substance.

This warning does not direct itself toward the increased and different danger of aspirating the aerosolized form of Tri-Ethane.

As apparently accepted by the District Court as well as the Court of Appeals, the physical effects of ingesting or inhaling the aerosolized form of the toxic product produces an entirely different physical reaction and harm than indicated on Respondent's warning label. The warning indicates the need for adequate ventilation, but ties this ventilation to "permissible limits" related to the gaseous or vaporized form of Tri-Ethane. This warning is not adequate to alert a potential user of significant danger of aspiration of aerosolized Tri-Ethane, and this would also be the case even if the user were using Tri-Ethane in an environment where

ventilation was sufficient to keep vaporized Tri-Ethane below its recommended exposure limits!

The Court of Appeals, while recognizing the distinction between aspiration of aerosolized Tri-Ethane and inhalation of vaporized Tri-Ethane, felt this distinction was not significant in terms of the adequacy of warning. However, it is respectfully submitted that this distinction is crucial to an understanding of whether the Respondent's warning was adequate as a matter of law. The warning label advised of the dangers of inhalation of gas and ingestion by swallowing. The warning advises the use of proper ventilation. The deceased died as a result of the aspiration of Tri-Ethane. He did not die from the inhalation of vapors of Tri-Ethane, nor did he died from ingestion or swallowing

Tri-Ethane. Would the "adequate ventilation" advised by appellee's warning label prevented the death of Homer T. Pruitt on the present facts of this case? Certainly, it must be readily apparent that a justifiable issue in this regard remains, ONE THAT SHOULD BE AND MUST BE RESOLVED BY A JURY.

It is respectfully submitted that a jury could reasonably and properly infer from the present evidence that the deceased died because he was inadequately warned of the dangers of exposure and aspiration of aerosolized Tri-Ethane. To conclude otherwise, requires a weighing of the evidence and the construction of inferences unfavorable to Petitioner, the non-moving party in the summary judgment proceeding. To conclude otherwise, is not justice, and could not be what this Honorable Court intended in Celotex, supra.

CONCLUSION

This case presents a unique opportunity for this Honorable Court to further clarify the federal standard for the practical application of summary judgment in the lower Federal Courts. Such clarification is desperately needed by the bench and bar to prevent the establishment of summary judgment as a lethal weapon which deprives deserving litigants of their constitutional right to a jury trial and due process of law. Clarification is needed to produce consistency among the lower court decisions and specifically the decisions of the Eleventh Circuit Court of Appeals. In whatever context the facts of this particular case are interpreted, it is respectfully submitted that this case provides a unique opportunity for this Honorable Court to demonstrate the

parameters of summary judgment application in negligence related cases.

Specifically in this case, when interpreting the evidence in the light most favorable to the non-moving party, the Petitioner clearly established that Homer T. Pruitt died as a proximate result of aspiration of aerosolized Tri-Ethane. This type of exposure is potentially more harmful than the inhalation of the gaseous form, or even swallowing the substance. Respondents knew or should have know, of the potential increased harm of exposure aerosolized Tri-Ethane. The deceased was inadequately warned of the specific foreseeable danger and harm that caused his death. It is repectfully submitted the decision of the Eleventh Circuit Court of Appeals in affirming the grant of summary judgment results in an

improper application of the federal standard set out in Celotex, supra, in light of the evidence in this case and logical inferences to be draw therefrom when such construction is made in a light most favorable to Petitioner. The entire area regarding the proper application of summary judgment standards is in turmoil. For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Dated this 30th day of July, 1990.

Respectfully submitted,

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Counsel of Record for
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CERTIFICATE OF SERVICE

I, E. Lamar Gammage, Jr., counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 30, 1990, three copies of the foregoing Petition for Writ of Certiorari were mailed in the United States Mail, postage prepaid, to all counsel for Respondent as follows:

Mr. James R. Miller
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Mr. Nicholas S. Papleacos
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I further certify that all parties required to be served have been served.

E. Lamar Gammage, Jr.
Counsel for Petitioner

APPENDIX

(a) Opinion of the United States Court of Appeals for the Eleventh Circuit, dated March 1, 1990, reported in 895 F2d. 734;---------- A-1

(b) Order of the United States District Court for the Northern District of Georgia dated June 13, 1989;---------- A-9

(c) Order of the United States Court of Appeals for the Eleventh Circuit denying rehearing dated May 1, 1990;-- A-20

(d) Judgment of the United States Court of Appeals for the Eleventh Circuit issued as mandate May 9, 1990, filed May 10, 1990 ---------- A-22

PHYLLIS PRUITT, Individually
and as Mother and Next Friend
of bnf Katie C. Pruitt,

Plaintiffs-Appellants.

v.

P.P.G. INDUSTRIES, INC.,

Defendant-Appellee.

No. 89-8557.

United States Court of Appeals
Eleventh Circuit.

March 1, 1990.

Family of aircraft worker who died after he aspirated aerosolized liquid droplets of cleaning solvent brought wrongful death/products liability suit against solvent's manufacturer. The United States District Court for the Northern District of Georgia, No. 1:88-cv-870-RCF, Richard C. Freeman, J., entered summary judgment in manufacturer's favor, and family appealed.

The Court of Appeals held that: (1) warning on label on 55-gallon drums of cleaning solvent was sufficient to alert users to dangers of aspirating substance in liquid form, and (2) survivors waived argument that removal of case unconstitutionally circumvented state summary judgment standard.

Affirmed.

Appeal from the United States District Court for the Northern District of Georgia.

Before CLARK, Circuit Judge, RONEY, Senior Circuit Judge, and ATKINS, Senior District Judge.

PER CURIAM:

This is a wrongful death suit brought by decedent's wife and daughter against the manufacturer of a cleaning solvent. They appeal the district court's grant of sumary judgment in favor

of the defendant based on its decision that adequate warnings were given concerning the dangers that could be encountered in the use of the product. We affirm.

Decedent Homer T. Pruitt was employed as a supervisor for Lockheed Corporation at its plant in Marietta, Georgia. He was working in the fuselage area of an aircraft on May 15, 1987, when he collapsed and later died. Based on an autopsy, the coroner determined that Pruitt's death was caused by exposure to fumes and residue from a cleaning and degreasing solution used by Lockheed in the maintenance of its aircrat. This solvent, 1-1-1-Trichloroethane was produced by defendant P.P.G. Industries, Inc. under the registered trade name Tri-Ethane 366. The solvent was shipped to Lockheed in 55-gallon drums, on which

PPG had attached a warning label. The label states in large bold letters, "WARNING! VAPOR HARMFUL" and further states in smaller letters:

> DO NOT BREATH VAPORS. High vapor concentrations can cause dizziness, unconsciousness or death. USE ONLY WITH ADEQUATE VENTILATION. Ventilation must be sufficient to limit employee exposure to Tri-Ethane below permissible limits... DO NOT SWALLOW. Swallowing may cause injury or death.

The label warns that one should not attempt to induce vomiting in a person who has swallowed the substance. If a person has difficulty breathing after inhalation, or if a person has swallowed some of the solvent, he should contact a physician. P.P.G. also provided an

information sheet to Lockheed warning of the dangers, including death, resulting from inhalation of the solvent.

[1] In arguing that this warning is not sufficient as a matter of law, plaintiffs argue that there is a distinction between "inhalation" of gaseous materials and "aspiration" of liquids. Decedent died because he allegedly aspirated aerosolized liquid droplets of Tri-Ethane, created by the use of pump spray bottles in Lockheed's cleaning process. This aspiration led to chemical pneumonitis, a condition in which the victim's lungs fill with liquid. Inhalation of the solvent's vapors allegedly would have produced a different physical reaction and cause of death, cardiac arrest.

Plaintiffs contend that the label warned of the dangers of inhalation and is not adequate to warn of the

dangers of aspiration. We affirm the district court's decision that P.P.G.'s warning was sufficient as a matter of law to cover the dangers of aspiration. Assuming the plaintiffs are correct that inhalation of Tri-Ethane in gaseous form produces a different physical reaction than aspiration of the substance in liquid form, the warning adequately placed Lockheed and its employees on notice of the danger of each action. A reasonable viewer of P.P.G.'s label would have to conclude from the warning that "breathing" or "inhaling" the solvent in liquid form was at least as dangerous as inhalation of its vapors and that appropriate precautions should be taken in any event, namely, adequate ventilation and avoidance of direct contact with the substance in either form. Since inadequacy of the warning is a

necessary element of the plaintiffs' cause of action, see Copeland v. Ashland Oil Co., 188 Ga. App. 537, 373 S.E.2d 629, cert denied, 188 Ga. App. 911, 373 S.E.2d 629 (1988) and since the plaintiffs failed to adduce any evidence showing they could prove this element at trial, the district court correctly granted summary judgment in favor of P.P.G. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.CT. 2546, 2552, 91 L.Ed.2d 265 (1986).

The plaintiffs moved to strike affidavits submitted by P.P.G. in support of its motion for summary judgment, claiming that the affidavits violated Fed.R.Civ.P. 56 in various ways. There was no error in the district court's denial of this motion.

[2] Plaintiffs asset that their constitutional right to trial by jury was violated by the district court's use of

the federal standard for granting summary judgment, as set out in Rule 56 in this case. The argument is that by invoking its statutory right of removal of the case from state court, P.P.G. unconstitutionally circumvented the state summary judgment standard. Appellants did not raise this issue before the district court, nor have they demonstrated, in light of the Copeland case, supra, that a different result would obtain under the state standard. There appears to be no legal support for the general contention that the constitutional right to a jury trial requires a federal court to apply a state standard for the award of summary judgment in a diversity case.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHYLLIS PRUITT, individually and KATIE C. PRUITT, a minor by PHYLLIS PRUITT, her mother and "Next Friend"	:	Filed in Clerk's Office, U.S.D.C. Atlanta June 14, 1989 Luther D. Thomas, Clerk
	:	1:88-cv-870-RCF
vs.	:	
PPG INDUSTRIES, INC.	:	

ORDER

This action is before the court on defendant's motion for summary judgment and plaintiffs' motion to strike.

The evidence, construed in plaintiffs' favor, shows that Homer T. Pruitt, husband of plaintiff Phyllis Pruitt, died on May 15, 1987 as a result of his exposure tc an industrial chemical that is manufactured and sold by defendant. Defendant sold the chemical, 1,1,1, trichloroethane, under the

registered trade name Tri-Ethane 366 (Tri-Ethane) to decedent's employer Lockheed Georgia Company (Lockheed). Lockheed's employees, including decedent, used Tri-Ethane as a solvent to remove grease and soil from metals in production and maintenance operations.

Defendant shipped Tri-Ethane to Lockheed in 55-gallon drums. Lockheed's employees, including decedent, would often transfer Tri-Ethane to plastic bottles for use. Defendant attached a warning label to the drums shipped to Lockheed. The warning label stated in large letters "WARNING! VAPOR HARMFUL." In smaller letters the label stated

> DO NOT BREATH VAPORS. High vapor concentrations can cause dizziness,unconsciousness or death. USE ONLY WITH ADEQUATE VENTILATION. Ventilation must be sufficient to limit employee exposure to

Tri-Ethane below permissible limits.... DO NOT SWALLOW. Swallowing may cause injury or death.

See Exhibit A to defendant's motion for summary judgment. Defendant also provided Lockheed with a Material Safety Data Sheet (MSDS) that stated

> Tri-ethane is primarily a central nervous system depressant. Inhalation can cause irritation of the respiratory system, dizziness, nausea, lightheadedness, headache, [loss] of coordination and equilibrium, unconsciousness, possible central nervous system damage and even death in confined or poorly ventilated areas. Fatalities following severe acute exposure to various chlorinated solvents have been attributed to ventricular fibrillation.

See MSDA, Eighth Edition, Section 5, attached as exhibit C to defendant's motion for summary judgment. The MSDS warning also stated that following ingestion "[v]omiting and subsequent aspiration into the lungs may lead to chemical pneumonia and pulmonary edema which is a potentially fatal condition." Id.

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986) the Supreme Court clarified the standard for granting summary judgment. The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 324, 106 S. Ct. at 2554. The nonmovant, however, bears the burden of making a sufficient showing establishing

the existence of each element essential to his case, and on which he will bear the burden of proof at trial. Id. at 322, 106 S. Ct. at 2553. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. Anderson, 477 U.S. at 252, 106 S. Ct. at 2512. The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id.

Plaintiffs contend defendant was negligent in failing to provide an adequate warning; that defendant breached warranties of fitness because it did not provide adequate instructions or warnings for the use of Tri-Ethane; and that defendant is strictly liable under Off. Code Ga. Ann. § 51-1-11(b) because

defendant placed Tri-Ethane in the stream of commerce without adequate instructions or warnings, thus rendering Tri-Ethane "defective." Under Georgia law, proof of these causes of action are essentially the same in that each requires proof of the inadequacy of the warning. See Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262, 296 (N.D. Ga. 1985), aff'd in part, modified in part, 788 F.2d 741 (11th Cir. 1986).

Generally, the sufficiency of a manufacturer's warning is for the jury. Copeland v. Ashland Oil, Inc., 188 Ga. App. 537, 538, 373 S.E.2d 629, 630 (1988). The warnings provided in this case, however, are clearly sufficient as a matter of law. The warning label states in bold, large letters that breathing Tri-Ethane vapors is dangerous and can be fatal. The autopsy report states the cause of death as "inhaled chemical

fumes-residue." Exhibit A to affidavit of Dr. Wayne K. Ross, M.E. Thus, the label warned against the precise harm that occurred in this case. Additionally, the Material Data Safety Sheet provided further warnings and precautions for use.

Plaintiffs attempt to create a material issue of fact by distinguishing between inhalation of Tri-Ethane vapors and aspiration of Tri-Ethane aerosolized droplets caused by using pump spray bottles. Plaintiffs contend that the warning labels were insufficient to warn persons of the danger of using Tri-Ethane in an aerosolized form. Assuming, as the court must at the summary judgment stage, that decedent's death was caused by aspiration of droplets from a pump spray

bottle rather than inhalation of vapor,[1] the court finds defendant was not under a duty to warn of this danger.

The basis for the manufacturer's duty to warn is the manufacturer's actual or constructive knowledge that use of its product entails a non-obvious and foreseeable danger. Wells, 788 F.2d at 745-46. Plaintiff has presented insufficient evidence for a jury to determine that defendant knew, prior to May 15, 1987, or at anytime thereafter, that placing Tri-Ethane in pump spray bottles created a greater danger than placing Tri-Ethane directly on the material to be cleaned or on a cloth.

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[1]Evidence is lacking that defendant was using a pump spray bottle to apply Tri-Ethane. The evidence demonstrates that Lockheed employees use squeeze bottles rather than pump spray bottles that create an "aerosolized" mist. See Exhibit 13 to Deposition of John Branch.

Plaintiffs base their contention solely on a study on animals that "suggests the possibility that aspiration of the material can possibly lead to chemical pneumonitis." Depo. of Barter at 68 (question by plaintiffs' counsel). Plaintiffs have not presented this study to the court. Nor have plaintiffs presented expert evidence that the results of the animal study should have alerted defendant to the necessity of a warning based on the study. Plaintiffs present only the affidavit of Robert Jesse Cunitz, Ph.D., a licensed psychologist, specializing in the "field of human factors psychology as it relates to safety and the adequacy of product instructions and warnings relative to produce use." Affidavit of Cunitz, ¶ 1. Cunitz does not state that he reviewed the animal study. Furthermore, Cunitz clearly does not have any expertise in

toxicology. Without such expert evidence, plaintiffs cannot meet their burden of proving that defendant had knowledge of the danger of using aerosolized Tri-Ethane. Additionally, Plaintiffs have presented insufficient evidence from which a jury could determine that defendant in the exercise of reasonable care ought to have known of the report such that it could have provided a warning to users of Tri-Ethane prior to May 1987. The absence of defendant's alleged knowledge precludes imposing a legal duty to warn on defendant.

Accordingly, defendant's motion for summary judgment is GRANTED. Plaintiffs' motion to strike is DENIED. The Clerk is DIRECTED to enter final judgment in favor of defendant.

SO ORDERED, this 13 day of June, 1989.

s/ Richard C. Freeman
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8557

Filed in U.S.
Court of Appeals
Eleventh Circuit
May 1, 1990
Miguel J. Cortez,
Clerk

PHYLLIS PRUITT, Individually
and a Mother and Next Friend of
bnf
Katie C. Pruitt.

Plaintiffs-Appellants

versus

P.P.G. INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District
Court for the Northern District
of Georgia

ON PETITION(S) FOR REHEARING
(May 1, 1990)

BEFORE: CLARK, Circuit Judge, RONEY*,
Senior Circuit Judge, and ATKINS**,
Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Phyllis Pruitt is DENIED.

ENTERED FOR THE COURT:

s/ Thomas A. Clark
United States Circuit Judge

*See Rule 34-2(b), Rules ofthe U.S. Court of Appeals for the Eleventh Circuit.

**Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8557

D.C. Docket No. 1:88-cv-870-RCF

Filed in Clerk's Office,
U.S.D.C. Atlanta
May 10,1990
Luther D. Thomas
Clerk

PHYLLIS PRUITT, Individually
and as Mother and Next Friend
of bnf Katie C. Pruitt,

Plaintiffs-Appellants

versus

P.P.G. INDUSTRY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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Before CLARK, Circuit Judge, RONEY*, Senior Circuit Judge, and ATKINS**, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the

United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that the plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.
**Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Entered: March 1, 1990

For the Court: Miguel J. Cortez, Clerk

BY: s/Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: May 9, 1990